STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

Supreme Court
No.

vs.

RICHARD KIMBLE,
Defendant-Appellee.

Court of Appeals. 227212
Lower Court No. 99-06942

BRIEF ON APPEAL
***ORAL ARGUMENT REQUESTED

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research
Training and Appeals

JANET A. NAPP (P-40633)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5741

Table of Contents

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

STATUTES

SUMMARY OF ARGUMENT

The comprehensive sentence-guidelines scheme, which precludes the raising of a challenge to the scoring of the sentence or challenging the accuracy of the information relied upon in determining a sentence if it is within the appropriate guidelines sentence range, *unless* the defendant raises the issue at sentencing, or in a proper motion for resentencing, or remand filed in the court of appeals. This exhaustion requirement is apparent from an ordinary meaning of the statute, and clearly applies to *all* offense variables, including OV 16.

Here, defendant not only failed to meet the exhaustion requirements of MCL 769.34(10), but he waived the issue by expressly conceding the issue. Waiver, which is the is "the intentional 'relinquishment or abandonment of a known right,'" extinguishes an error.[1] Thus, there is no coring error to review.

While this Court plainly has exclusive authority over practice and procedure, it cannot abrogate or modify substantive law. In enacting the legislative guidelines, the legislature created a substantive right to correct scoring, and conditioned the right to correct the scoring on litigation of any dispute first in the trial court as a condition precedent to litigation in the appellate court. In requiring exhaustion of remedies, the legislature intended to limit the substantive right it created. MCL 769.34(10) is a *not* a matter of practice and procedure.

---

[1] *People v Carines,* 460 Mich 750, 762-763, fn 7 (1999), citing *United States v Olano,* 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *Johnson v Zerbst,* 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

STATEMENT IDENTIFYING THE JUDGMENT BEING APPEALED FROM AND STATEMENT OF FACTS

Defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, after a bench trial. Defendant was sentenced to thirty to seventy years for the murder conviction, and a mandatory two years for the felony-firearm conviction. Victor Caldwell testified that he was sitting in the passenger seat of the car, next to the victim, and his son was laying on his lap. (Apx. 2a). Caldwell heard someone hit the window and state "[g]et the fuck outa' the car, get outa' the car." He saw a gun. Caldwell heard gun fire, and saw the front driver's seat window shatter. The victim got out of the car. When Caldwell walked up to the house, he noticed the victim was not following him. The victim was standing at the gate and informed Caldwell she had been shot. (Apx. 2a-10a).

Defendant 's confession was admitted into evidence. He stated that "[o]n Wednesday night, me Joshua and Jigger were riding around. We saw a car with Dayton rims. We followed the car and watched them pull into the driveway. I got out of Joshua's car and walked up the driveway to the driver's side window, and knocked on the window, and told the lady to get out. (Apx. 11a-12a).

In his appeal of right, defendant claimed that the sentencing court erroneously scored offense variables (OV) nine (9), ten (10), and sixteen (16). OV 16, the subject of this appeal, addresses property obtained, damaged, lost, or destroyed, allows one point to be scored if the value of the property destroyed was valued at less than $200.00, but not more than $1000.00. The instructions state that this variable is scored in the Crimes Against a Person category only if the offense being scored is Home Invasion First or Second. Defendant agreed with the scoring of the variable: "In this

particular case, we're talking about a vehicle that's a 1983 car. . .But I concede that with the rims, it's worth more than two hundred dollars but less than a thousand dollars, Judge. (Apx. 13a-14a). And there is nothing to the contrary, so that the one point is accurate, Judge."

On July 19, 2002, the Court of Appeals affirmed defendant's conviction, but remanded the case for resentencing, holding that the forfeiture did not extinguish the error of applying OV 16 because it did not apply to defendant's conviction. Judge Griffen dissented, and would have held that both statute and court rule precluded resentencing. *People v Richard Kimble,* No. 227212, rel'd July 19, 2002.

The People filed for delayed application for leave to appeal. On March 26, 2003, this Court granted leave to appeal, and directed the parties to address the following issues: (1) whether the preservation requirement of MCL 769.34(10) applies to the claim relating to Offense Variable 16; (2) if applicable, would the statute preclude an appellate court from considering the claim of error even under a plain error standard; and (3) citing, *McDougall v Schanz,* 461 Mich 15 (1999), whether such a provision is within the power of the Legislature.

It is to those questions, the People respond.

ARGUMENT

I.

MCL 769.34(10) prohibits a party from raising on appeal unpreserved challenges to the scoring of the sentence guidelines. Defendant at sentencing explicitly agreed with the scoring of OV 16. Resentencing is barred because defendant extinguished the error by expressly agreeing to the scoring of OV 16 and by failing to seek correction as required by law. This Court should not apply plain error review where the claim of error has been extinguished, and where the Legislature has specifically prohibited the defendant from raising the claim.

In the Court of Appeals, defendant challenged the scoring or application of OV 9, 10, and 16 in determining his sentence. While that court rejected defendant's claims as to OVs 9 and 10, the court remanded for resentencing due to the trial court's application of OV 16, even though defendant both forfeited that claim by failing to object, and extinguished any claim of error by agreeing that OV 16 applied.

This court has directed that the parties address three questions:

- ❑ Whether the preservation requirement of MCL 769.34(10) applies to the claim relating to Offense Variable 16?
- ❑ If applicable, would the statute preclude an appellate court from considering the claim of error even under a plain error standard?
- ❑ Whether such a provision is within the power of the Legislature? *McDougall v. Schanz,* 461 Mich. 15, 597 N.W.2d 148 (1999)

A. ¶ 10 Applies to Questions of the Applicability of Variables

To determine the appropriate guidelines sentence range, the trial court must

> Find the offense category for the offense from part 2 of this chapter. From section 22 of this chapter, determine the offense variables to be scored for that offense category and score only those offense variables for the offender as provided in part 4 of this chapter. Total those points to determine the offender's offense variable level.[2]

OV 16 has to do with property that is "obtained, damaged, lost, or destroyed."[3] By statute, it is to be scored only in home invasion cases.[4] In scoring the guidelines, the trial judge is to "score only those offense variables" that apply,[5] and OV 16 does not apply to the crimes against person category of offenses. Defendant did not contest the applicability of OV 16 to the conviction here at any time in the trial court, either contemporaneously with the sentencing, or by way of a motion for resentencing or a motion to remand to the trial court filed with the Court of Appeals.

The comprehensive sentence-guidelines scheme includes the provision that

> A party *shall not raise on appeal* an issue challenging the *scoring of the sentence guidelines* or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.[6] (Emphasis supplied).

The majority of the panel concluded that despite this provision the scoring error here was properly before it on three theories, all of which are mistaken. First, said the majority, because the

---

[2]MCL 777.21.

[3]MCL 777.46.

[4]MCL 777.22.

[5]MCL 777.21.

[6]MCL 769.34(10).

first sentence of ¶ 10 provides that "[i]f a minimum sentence is within the *appropriate* guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentence guidelines or inaccurate information relied upon in determining the defendant's sentence,"[7]

> we read the statute to allow an unpreserved appellate challenge to the scoring if the sentence is *not* within the appropriate guidelines range.

The majority viewed this reading as proper because the "first sentence. . .*contemplates appellate review of scoring challenges* if the minimum sentence is not within the appropriate range. Indeed, this reading is most logical given the Legislature's repeated indication that appellate review is *based* on whether the sentence 'within the appropriate guidelines sentence range. . . .'" When the unexhausted error was corrected the guidelines range changed, and thus the sentence of the trial court was *not* "within the appropriate legislative guidelines range," reasoned the majority, so that the error was not subject to the exhaustion[8] requirements of paragraph (10).[9]

But this reasoning is circular, and renders the exhaustion requirements of the statute a nullity. General rules of statutory construction require that each word, phrase, and clause be construed in a

---

[7]Emphasis supplied.

[8]Though perhaps a form of preservation, the People believe the more accurate description of the statutory requirement here is that it is an exhaustion requirement, a point to which the People will return in Section C.

[9]*People v Kimble,* 252 Mich App 269, 276-277 (fn 5) (2002).

manner which will give effect to each and render none nugatory.[10] In construing a statute, the following "rules" must be followed.[11]

- ❑ Standard rules of statutory construction require that words be given their ordinary meaning unless the context indicates that a different sense was intended.
- ❑ The court must use common sense in its construction of a statute.
- ❑ The statute must be construed as a whole.

"Ordinary meaning" means that the words in a statute must be construed according "to their ordinary usage in the sense in which they are understood when employed in common language, without exclusion of other words unless necessary to give intelligible meaning to prevent absurdity and without regard to the court's own estimate of the wisdom of the statute."[12] A statute may not be construed in a manner "that would render any part of the statute surplusage or nugatory."[13] Further, words and phrases employed in a statute must be viewed in their context within the statutory scheme: "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociss:* 'it is known from its associates,'. . .This doctrine stands for the principle [of interpretation] that a word or phrase is given meaning by its context or setting."[14] Here, the majority has wrenched the word "appropriate" from the context of the statutory scheme to render the exhaustion requirements of the scheme surplusage–if a scoring error would *change* the guidelines range, then

---

[10]*People v Malach White,* 81 Mich App 226 (1978).

[11]*People v Anderson,* 119 Mich App 325, 330 (1982).

[12]*People v Terry,* 124 Mich App 656, 659 (1983).

[13]See e.g. *Wickens v Oakwood Healthcare System,* 465 Mich 53 (2001).

[14]See *Sweatt v Department of Corrections,* 468 Mich 172 (2003).

the trial judge did not sentence within the "appropriate" range, and so exhaustion of a scoring error is unnecessary, but if the trial judge's sentence is within the "appropriate" range *even if* a claimed error were to be re-scored as claimed, it is irrelevant. But viewing the statutory scheme in its context, its fair meaning is that

- If, *as scored,* a sentence is within the guidelines range specified by the scoring–that is, is not a *departure* from that range–the sentence is to be affirmed, *unless* there is error in the scoring or inaccurate information relied upon in determining the sentence.

- The question of whether the condition for upsetting a sentence that is within the guidelines as scored exists–that there is either error in the scoring or inaccurate information relied upon in determining the sentence–may only be litigated in an appellate court if it has been litigated first in the trial court, either contemporaneously with the sentencing, or by a proper motion for resentencing or proper motion to remand.

- If the condition for challenging the guidelines as scored is *not* met, then the only question is whether the sentence *as it is scored*–since the scoring may not be reviewed–is within the appropriate guidelines range for *that* scoring; that is, that it is not a departure. If it is, it is to be affirmed; if not the question becomes whether substantial and compelling reasons support the departure.

The majority also seems to have said–or at least suggested–that the exhaustion requirements of the statute are inapplicable where the question is not how *many* points to be scored for a particular variable, but whether that variable is to be scored *at all*, reducing the statute to barring review of primarily mathematical computation errors.[15] This reading is inconsistent with the statutory text. The statute does *not* provide that the scoring of "the number of points" for an offense or prior-record variable must first be raised at sentencing, or by way of a proper motion for remand, it provides that the scoring "of the *sentencing guidelines*" must be preserved in one of these manners. In other words, the total points calculated–the guidelines as scored–is not subject to challenge on appeal

---

[15]Opinion at 277, fn 6: " 'misscoring' error might be better characterized as attributing the wrong number of points to an offense variable that would normally apply."

unless properly preserved, and if the claim is that points were included that should not have been because a variable should not have been scored, that claim quite plainly is a challenge to the scoring of the guidelines that produced the sentencing range.

Finally, the majority concluded that even if the exhaustion requirements of ¶ 10 apply here, the failure to meet them results in a forfeited claim of error, reviewable for plain error. Again, the majority is mistaken, for the failure to meet the requirements of the statute results not simply in issue forfeiture, but *waiver*–the *extinguishment* of any claim.

B. Failure to Meet the Exhaustion Requirement of ¶ 10 Constitutes Waiver.

For some years, the terms "waiver" and "forfeiture" were used interchangeably, and rather imprecisely, causing at least one federal court to note:

> [c]ourts have not always verbally adhered to the distinction when speaking about a claim of plain error that arises out of a party's failure to assert an evidentiary objection. Thus, they often refer to a party as having 'waived an objection' when, in fact, they mean that the party has only forfeited the objection. But the substantive distinction remains both clear and crucial. If a party's failure to take an evidentiary exception is simply a matter of oversight, then such oversight qualifies as a correctable "forfeiture" for the purposes of plain error analysis. If, however, the party consciously refrains from objecting as a tactical matter, then that action constitutes a true "waiver," which will negate even plain error review.[16]

Another federal circuit has described the difference between waiver and forfeiture thusly: "A common distinction we draw between waiver and forfeiture is that waiver comes about intentionally whereas forfeiture occurs through neglect."[17] Finally, the First Circuit distinguishes

---

[16] *United States v Yu-Leung,* 51 F 3d 1116, 1121-1122 (CA 2, 1995). (The petitioner raised a plain error claim, and the court, found the issue waived because of the clear strategic choices made by his defense counsel).

[17] *United States v Williams,* 272 F 3d 845, 855 (CA 7, 2001) (a case truly involving forfeited error), citing *United States v Staples,* 202 F 3d 992, 995 (CA 7, 2000).

waiver and forfeiture by recognizing "'. . .where there was a forfeiture, we apply a plain error analysis; where there was waiver, we do not.'"[18]

While the distinction between "waiver" and "forfeiture" has been widely debated in recent years, this Court has done much to precisely define and separate these two legal doctrines.[19] Suffice it to say that "waiver" is "the intentional 'relinquishment or abandonment of a known right,'" as opposed to forfeiture, which is the failure to timely assert a right.[20] The primary, and most devastating effect of the differentiation between the terms is that waiver extinguishes an error, while forfeiture does not, or as more artfully stated by the First Circuit, "[t]he distinction between forfeiture and waiver brings our plain error analysis to a grinding halt."[21] Thus, an appellant affirmatively waives any objection by telling the court that the challenged procedures were "fine," or "acceptable,"[22] or where he or his attorney "manifests an intention or expressly declines to assert a right."[23]

The defendant who waives an error, then, *may not* seek appellate review for *that* reason, for the claim of error has been extinguished by the implicit or explicit agreement, or concession of the

---

[18]*United States v Ciocca,* 106 F 3d 1079, 1085 (CA 1, 1997), quoting *United States v Mitchell,* 85 F 3d 800, 807 (CA 1, 1996).

[19]*People v Grant,* 445 Mich 535 (1994); *People v Mateo,* 453 Mich 203 (1996); *People v Carines,* 460 Mich 750, 762-763, fn 7 (1999), citing *United States v Olano,* 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[20]*People v Carines,* 460 Mich 750, 762-763, fn 7 (1999), citing *United States v Olano,* 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *Johnson v Zerbst,* 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

[21]*United States v Yu-Leung, supra,* 51 F 3d at 1122.

[22]*Id.*

[23]*United States v Fudge,* 325 F 3d 910, 916 (CA 7, 2003).

propriety of the trial court's actions,[24] leaving no error to correct on appeal, and no issue to review even for plain error.[25] The right to raise the claim on appeal is *permanently* extinguished, and appellate review precluded,[26] except under extremely limited circumstances.[27]

The waiver doctrine applies to *all* areas of criminal jurisprudence, including but not limited to, the admissibility of evidence,[28] jury instructions,[29] the procedure used by the trial court in conducting an *in camera* hearing, or in handling a jury request,[30] and the failure to timely raise a

---

[24]*United States v Griffin,* 84 F 3d 912, 924 (CA 7, 1996), citing *United States v Olano, supra,* 507 US at 733-34.

[25]*United States v Harris,* 230 F 3d 1054, 1058-1059 (CA 7, 2000), citing *United States v Davis,* 121 F 3d 335, 337-38 (CA 7, 1997); *United States v Penny,* 60 F 3d 1257, 1261 (CA 7, 1995).

[26]*United States v Moreno,* 6 Fed. Appx 353, (CA 2, 2003), WL 1611424, citing *United States v Olano,* 507 US 725; *United States v. Williams,* 272 F3d 845, 855 (CA 7, 2001).

[27]A waiver does not foreclose review in *every* instance, but the scope of review *is* limited. A defendant may pursue a claim that relates directly to the negotiation of the waiver (that it was involuntary, based on an impermissible factor, exceeds the statutory maximum, or that he was provided ineffective assistance of counsel. The scope of the agreement may also be litigated because waivers are strictly construed. *Glover v United States,* 531 US 198; 121 S Ct 696; 148 L Ed.2d 604 (2001); *United States v Horey,* ___ F 3d ___, 2003 WL 21437210 (CA 10, 2003); *United States v Harris, supra,* 230 F 3d at 1059; *Jones v United States,* 167 F 3d 1142, 1144 (CA 7, 1999); *Bridgeman v. United States,* 229 F3d 589, 591-92 (CA 7, 2000). None of these issues were raised below and are not before this Court. Additionally, a line of Illinois cases applies plain error review to waived error. The cases, which rely on state law, as opposed to the waiver doctrine, seem to confuse the terms, and do not consider *United States v Olano, supra,* 507 US 725. See *People v Reed,* 668 NE 2d 51 (Ill App 1 Dist, 1996), and *People v Townsell,* 783 NE 2d 164 (Ill App 3 Dist, 2003), *and* cases cited therein.

[28]*United States v Yu-Leung, supra,* 51 F 3d at 1121; *United States v Cooper,* 243 F 3d 411 (CA 7, 2001); *United States v Tulk,* 171 F 3d 596 (CA 8, 1999).

[29]*United States v Moreno,* 6 Fed Appx 353, (CA 2, 2003), WL 1611424; *People v Fetterley,* 229 Mich 511(1998).

[30]*In re Grand Jury Subpoena as to C 97-216,* 187 F 3d 996 (1999, CA 8).

double jeopardy bar in the trial court.[31] Waiver applies to both constitutional and statutory rights, and the degree of specificity required to waive an issue depends on the nature of the right waived (e.g. fundamental rights such as the right to a jury trial, as opposed to rights that may be waived by the conduct of the attorney, such as here.)[32] Michigan, like other jurisdictions, applies the waiver doctrine to a broad range of issues, including sentencing.[33]

The general rule in Michigan, then, is that "[c]ounsel may not 'expressly acquiesce' to the court's handling of a matter and then raise it as an error before [the appellate court]."[34] This acquiescence (waiver) extinguishes any error, *and* precludes defendant from raising the issue on appeal.[35] Any other result would allow counsel to harbor error to use as an appellate parachute.[36] Thus, a defendant who expresses satisfaction that the sentence guidelines are scored correctly cannot later assert a scoring error requires resentencing, even if error *does* exist, for he extinguished the scoring error by his own agreement.[37] Similarly, a defendant who chooses to abandon an earlier objection to the accuracy of the information relied upon by the trial court in sentencing, cannot raise

---

[31] See *United States* v *Perez*, 565 F 2d 1227 (CA 2, 1977); *Grogan* v *United States*, 394 F 2d 287 (CA 5, 1967) (the defendant was tried on the same indictment in two successive trials, and then claimed a double jeopardy violation, which he lost because the claimed constitutional violation "presented itself at the commencement of the second trial."

[32] *New York v Hill,* 528US 110; 120 S Ct 659; 145 L Ed 2d 560 (2000), quoting *United States v. Mezzanatto,* 513 US 196, 200, 115 S Ct 797, 130 L Ed 2d 697 (1995); *United States v Olano, supra,* 507 US at 733; *People v Carter,* 462 Mich 206 (2000).

[33] See *People v Carter, supra,* 462 Mich 206; *People v Riley,* 465 Mich 442 (2001).

[34] *People v Carter, supra,* 462 Mich at 213-216; *People v Riley, supra,* 465 Mich at 449.

[35] *People v Carter, supra,* 462 Mich at 208-209.

[36] *Id.*, at 149.

[37] *People v Davidson,* (unpublished opinion, WL 21519845 (July 3, 2003), p. 4. (Apx. 15a-17a).

that same issue on appeal because he waived or extinguished, as opposed to forfeited the claimed error.[38] A defendant who requests *and* receives a sentence within the guidelines, cannot later challenge that guideline sentence as too harsh given his age because "the intentional relinquishment of a known right constitutes a waiver which extinguishes the error."[39] Finally, a defendant's counsel can waive his client's presence at a later sentencing hearing to amend the sentence to conform to the law, thus extinguishing the error of his non-presence at the sentencing proceeding.[40]

Federal circuits and sister state jurisdictions also follow and apply the waiver rule to sentencing. Thus, when a defendant claimed entitlement to a downward departure in his sentence on appeal, the Seventh Circuit looked at the stipulation between the parties that he would be eligible for sentencing relief "if the district court determined that he did not possess a firearm in the course of the offense,"and the district court's decision *not* to grant the request.[41] Even though the parties on appeal conceded the issue was reviewable under a plain error analysis, the court disagreed, holding that the defendant "extinguished the issue by affirmatively declining to object at sentencing."[42] Similarly, when a defendant "accept[ed] for the purposes of this sentencing hearing

---

[38]*People v Petty,* (unpublished opinion, WL 866621 (April 26, 2002), p 6. (Apx. 18a-24a).

[39]*People v Chase,* (unpublished opinion, WL 1654944 (December 21, 2001), p. 6, citing *People v Carter, supra,* 462 Mich at 215-216. (Apx. 25a-28a).

[40]*People v Manley,* (unpublished opinion,, WL 31934382 (November 19, 2002, p. 2, citing *id.* (Apx. 29a-31a).

[41]*United States v Harris,* 230 F 3d 1054, 1059 (CA 7, 2000).

[42]*Id.*

the calculations regarding criminal history," he "relinquished and abandoned his arguments," thus extinguishing any error and waiving appellate review.[43]

A defendant may also choose to waive preparation of a presentence report,[44] sentencing under a new law,[45] or any challenge to the calculation of his offense level, as demonstrated by a case where, in response to the court's question whether he disputed that his offense be categorized as a level 13, he stated that he did not: "[b]y such statement, [he] plainly communicated an intention to relinquish and abandon any arguments related to his offense level calculation."[46] Waiver applies where a defendant stated that he did not object to a two-level sentencing enhancement, or by declining to object at sentencing,[47] and where a defendant concedes to previously objected to portions of the Presentence Information Report.[48]

A defendant may also not challenge for the first time the reasons given by the trial court for imposing a discretionary sentence if he did not object in the trial court, even if "the stated reasons allegedly do not apply to the particular case, and [in] cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons."[49] This rationale is meant to

---

[43]*People v Redding,* 104 F 3d 96, 99 (CA 7, 1996); *United States v Carrillo,* 269 F 3d 761 (CA 7, 2001).

[44]*Rowe v State,* 738 P 2d 166, 172 (Okla Crim App, 1987).

[45]*People v Jones,* 401 NE 2d 1054, 1061 (Ill App 1 Dist, 1980).

[46]*United States v Martinez-Jimenez,*294 F 3d 921 (CA 7, 2002).

[47]*United States v Richardson,* 238 F 3d 837, 841 (CA 7, 2001).

[48]*United States v Saucedo,* 226 F 2d 782, 787 (CA 6, 2000).

[49]*People v Scott,* 885 P 2d 1040, 1053 (Cal, 1994) (*Scott* presents a study of the issue under California law).

conserve judicial resources, and it recognizes the preparation and opportunity to be heard that is part of a sentencing hearing: "counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them."[50] Similarly, waiver applies where a defendant had a "meaningful opportunity" to object to the failure of the trial court to make factual findings justifying the imposition of a less or more severe sentence for a revocation of his probationary sentence.[51]

Even independent of ¶ 10 this case falls squarely within the waiver doctrine Michigan has followed diligently for years as a matter of a fair and reasonable judicial policy that balances the rights of the defendant and the scarce resources of the judiciary. Here, OV 16 clearly did not apply to this defendant and the offense he committed, and for that reason, there *is* sentencing error. The error, however, was *extinguished* by defense counsel's express agreement. While the defendant challenged the applicability of OV 16 in his appeal of right, not only did he *not* challenge OV 16 in the trial court, he *agreed* with the scoring of the variable: "In this particular case, we're talking about a vehicle that's a 1983 car. . .But I concede that with the rims, it's worth more than two hundred dollars but less than a thousand dollars, Judge. And there is nothing to the contrary, so that the one point is accurate, Judge." (Apx. 13a-14a). Defense counsel's explicit agreement on OV 16 was intentional, not a matter of neglect.[52] Because of this important distinction, any plain error analysis

---

[50] *Id.*

[51] *People v Minder,* 54 Cal Rptr 2d 555 (Cal App 6 Dist 1996).

[52] *United States v Williams, supra,* 272 F 3d at 855.

must grind to a halt.[53] No error remains, and there is no right to correction of this extinguished error, both under the waiver doctrine and the statute.

C. ¶ 10's Exhaustion Requirement Is Within the Authority of the Legislature.

In order to ascertain whether ¶ 10 is within the authority of the legislature, or instead falls within this Court's exclusive authority over practice and procedure, it must first be determined as precisely as possible just what it is that ¶ 10 does. Though somewhat analogous to a jurisdiction-stripping statute,[54] ¶ 10 does not deprive appellate courts of jurisdiction, being directed to the party and not the court ("a party shall not raise on appeal"). But ¶ 10 compares quite closely to exhaustion-of-remedies statutes.

For example, under the Tax Tribunal Act, the Tax Tribunal only acquires jurisdiction *after* an assessment is protested before the board of review, which requires the filing of a petition within a certain time period.[55] While at first blush these prerequisites might seem to limit the subject-matter jurisdiction, or authority of the tax tribunal, they do not, for the jurisdictional limits are detailed elsewhere,[56] and case law has construed the requirements as *codifying* the doctrine of exhaustion of remedies:

> Instead, we read the "jurisdictional" requirements. . .as procedural requirements for perfecting an appeal in the Tax Tribunal. . . The protest requirement is a codification of the doctrine of

---

[53] *United States v Yu-Leung, supra,* 51 F 3d at 1122.

[54] See and compare, for example, 8 USC § 1252(a)(2)(C): "Notwithstanding any other provision of law, *no court shall have jurisdiction to review* any final order of removal against an alien who is removable by reason of having committed [one or more enumerated] criminal offense[s]."

[55] MCL § 205.735; MSA § 7.650(35).

[56] MCL § 205.731; MSA § 7.650(31).

> exhaustion of remedies. The June 30 deadline is a statutory time limitation. These doctrines are normally available as affirmative defenses which would bar assertion of a claim. Neither doctrine, however, is a limitation on the subject-matter jurisdiction of the tribunal before which the claim is asserted.[57]

Thus, where the statutory requirements were not met, the Tax Tribunal "had an absolute duty to dismiss petitioner's appeal" because "petitioner failed to properly invoke the tribunal's jurisdiction."[58]

Federal habeas corpus law presents another illustration of a statute requiring the exhaustion of remedies before relief can be granted. Federal statutes and case law regulating petitions for writ of habeas corpus make it clear that a district court may not grant a writ of habeas corpus unless "the applicant has exhausted the remedies available in the courts of the State...." [59]

The aforestated enactments are in sharp contrast to jurisdiction-stripping statutes that completely *divest* the court of the *ability* to hear a case. For instance, judicial review of orders of removal of criminal aliens has been precluded:

> Notwithstanding any other provision of law, *no court* shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [one or more enumerated] criminal offense[s]. . . without regard to their date of commission. . . .[60]

---

[57]*Parkview Memorial Association City of Livonia,* 183 Mich App 116, 121 (1990). (Citations omitted).

[58]*Biltmore Wineman LLC v Township of Northville* (unpublished opinion, 2003 WL 178793, January 24, 2003, p. 3). (See appendix).

[59]28 USC § 2254(b)(1)(A). See also *Picard v Connor,* 404 US 270, 275-276; 92 S Ct 509; 30 L Ed 2d 438 (1971).

[60]8 USCA § 1252(a)(2)(C); *Immigration and Naturalization Service v St. Cyr,* 533 US 289, 121 C At 2271, 150 L Ed 2d 347 (2001); *McBrearty v Perryman,* 212 F 3d 985 (CA 7,

This exhaustion-of-remedies requirement is within the authority of the legislature. It is well-established that this Court has exclusive authority to determine rules of practice and procedure under the Michigan Constitution, while the Legislature has the ultimate power to determine penalties for criminal offenses :

> The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.[61]

> The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences.[62]

But, importantly, while the right to appeal is solely a legislative prerogative, the Supreme Court's rule making power as to practice and procedure are superior to that of the legislature.[63] Thus, this Court *may* consider plain error under its own practice and procedure rules, while recognizing that legislature still has the special responsibility "to determine in what cases, under what circumstances, and from what courts appeals may be taken:"

> Although mindful of the fact that Const.1963, art. 6, § 5 gives this Court the power to promulgate and implement rules of practice and procedure for Michigan courts, it is argued that, except where there are constitutional provisions otherwise, the right to an appeal is strictly a matter of legislative prerogative, and it is solely within the Legislature's province to determine in what cases, under what circumstances, and from what courts, appeals may be taken. *Moore v Spangler,* 401 Mich 360, 368-369, 258 N.W.2d 34 (1977); *Chicago, D & C G.T.J. R. Co. v. Simons,* 210 Mich. 418, 420, 178 N.W. 12 (1920). The jurisdiction of a court to entertain an appeal in a certain

---

1985).

[61]Const. 1963, art. 6, § 5.

[62]Const. 1963, art. 4, §45.

[63]Const. 1963, art. 6 § 5; *Mumaw v Mumaw,* 124 Mich App 114 (1983).

> matter is thus established by the constitution or by statute, and this Court may not, by rule or otherwise, enlarge or diminish such jurisdiction[64]

Similarly, this Court , by statute, "has all the powers and jurisdiction conferred upon it by the constitution and laws of this state,"[65] and has "jurisdiction and power over"

- ❑ any matter brought before it by any appropriate writ to any inferior court, magistrate, or other officer;
- ❑ any question of law brought before it in accordance with court rules, by certification by any trial judge of any cause pending or tried before him;
- ❑ any case brought before it for review in accordance with the court rules promulgated by the supreme court.[66]

While this court plainly has, as it noted in *McDougall v Schanz*, exclusive authority over practice and procedure, the court also observed that "it cannot be gainsaid that this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law."[67] The court there concluded that "a statutory rule of evidence violates Const 1963, art 6, § 5 only when 'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified....'"[68]

While the former "judicial guidelines" operated in a similar manner to the legislative guidelines, this court came to understand that its own guidelines could vest no substantive right permitting the setting aside of an otherwise valid sentence on the ground that the guidelines had been

---

[64]*People v Hudson,* No. 237505, rel'd April 1, 2003, WL 1760530, and unpublished opinion, citing *People v Coles,* 417 Mich 523, 533 (1983).

[65]MCL 600.212.

[66]MCL 600.215. See also *Binkley v Asire,* 335 Mich 89 (1952); MCL 660.223.

[67] 461 Mich at 27.

[68] 461 Mich at 30.

misscored. As Justice Boyle well put it in the *Mitchell* case, "Simply stated, because this Court's guidelines do not have the force of law, a guidelines error does not violate the law. Thus, the claim of a miscalculated variable is not in itself a claim of legal error."[69] But now the guidelines *do* have the force of law, and in its comprehensive scheme the legislative has vested the ability of a party to claim misscoring of the guidelines as a "claim of legal error" *conditionally*, requiring exhaustion of the claim first in the trial court. Not only is the claim in the present case waived, then, under traditional principles of issue waiver, it is not *vested* because of the failure of the defendant to exhaust the claim as required by the legislature. An appellate brief raising the issue barred by ¶ 10 should have the issue stricken by the appellate court in which it is filed, for by raising the issue the party briefing it has violated the law, and the duty of the appellate court in this circumstance is plain.

This is no matter of procedure; it does not concern the number of copies of the pleading to be filed, the contents of the pleading and their order, or the formatting of the pleading. Rather, in creating, for the first time, a substantive right to correct scoring, the legislature conditioned that right on litigation of any dispute first in the trial court as a condition precedent to its litigation in an appellate court. While surely the legislature was concerned with overburdening appellate courts with additional litigation through its statutory guidelines scheme, that concern was legitimate, and expressed itself by *limiting* the substantive right it was creating by requiring its exhaustion. For an appellate court to address an unexhausted guidelines issue is for that court to vest a substantive right in the party raising the claim where the legislature intended no substantive right exist. This is not a matter of practice and procedure.

---

[69] *People v. Mitchell*, 454 Mich 145, 175 (1997).

D. Conclusion

The defendant in this case agreed with the scoring of OV 16. Any claim of error was thus extinguished under ordinary principles of appellate review. Further, independent of defendant's waiver of the issue, by statute defendant was prohibited from raising a claim of misscoring of the guidelines unless the issue was first pressed in the trial court, either contemporaneously with the sentencing, or by way of a motion for resentencing or proper motion for remand. The substantive right to correct scoring of the guidelines created by the statutory scheme is conditioned on this exhaustion of remedies, and vests on its exhaustion. Because defendant failed to exhaust the claim as required by law, the substantive right never vested, and the Court of Appeals was obligated by law to strike the claim, something it failed to do. Defendant is in the same position as a defendant under the judicial guidelines as explained in *Mitchell*–a claim of misscoring not properly exhausted is simply not a claim of legal error. The sentence should be affirmed.

RELIEF

WHEREFORE, the People respectfully request this Honorable Court to reverse the decision of the Court of Appeals, and reinstate defendant's sentence.

Respectfully Submitted,

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research
Training, and Appeals

JANET A. NAPP (P-40633)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
(313) 224-5741

Dated: August 29, 2003
JAN/js